In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1120

ALVIN BEIGEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Having waived trial by jury, petitioner, among others, was convicted by Judge Weinfeld of the United States District Court for the Southern District of New York for narcotics offenses and conspiracy to commit such offenses. 254 F. Supp. 923. He was sentenced to concurrent terms of imprisonment of seven-and-one-half years. The court of appeals affirmed the conviction on January 9, 1967 (Pet. App. B). On February 11, petitioner applied to the Cir-

cuit Justice for an extension of time (through March 8) within which to file a petition for a writ of certiorari. The extension was granted "without prejudice to the Court's consideration of whether this application has been filed in time." On March 6, the petition was filed. Since the application for an extension of time was filed more than thirty days after the entry of the court of appeals' judgment, the present petition is out of time under Rule 22(2) of the Rules of this Court. There is, in any event, no occasion for review.

Petitioner contends that heroin taken from him at the time of his arrest on March 21, 1963, was improperly admitted in evidence at his trial. The courts below correctly ruled that this contention is without merit.

It is evident from the facts set out in considerable detail in the opinions of the district court (254 F. Supp. at 926-930) and the court of appeals (Pet. App. 26-29) that, on the basis of their surveillance over a period of several weeks, federal narcotics agents and city detectives, who were working together, had ample cause, prior to March 21, to believe that petitioner was involved in illicit narcotics traffic. On the night in question, co-defendant Lapi was observed tossing a brown paper bag into the rear of a car which petitioner had rented. A few hours later, petitioner entered the car and drove it to his apartment house, where he was observed leaving the car carrying a brown paper bag. As he was about to enter his apartment, he was stopped at the threshold by detectives Cahill and Meehan, who showed him a

search warrant, arrested him and seized the bag (Tr. I, 13a-14a, 23a; III, 40a-41a).[1] Other federal and city officers arrived shortly thereafter. The bag was searched and found to contain approximately two kilograms of heroin. The officers also searched the apartment, finding more heroin, "full narcotic cutting equipment and paraphernalia for packaging narcotics for distribution to the retail trade" (254 F. Supp. at 928).

The search warrant which the city officers possessed at the time of the arrest was subsequently held invalid by a State court (because the warrant did not authorize a night-time search) at a trial of petitioner alone. Petitioner argues that, because of that adjudication, the evidence with respect to the heroin found on his person at the time of the arrest should have been suppressed at his federal trial.[2] This contention is without substance. The State court's ruling on the search warrant did not decide the issue before the federal court—*i.e.*, whether there was probable cause to arrest petitioner without a warrant. As the courts below both held, there was "ample probable cause for believing that [petitioner] had committed, and was committing, a felony" (Pet. App.

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[1] "Tr. I" and "III" refer to documents containing reproduced portions of the testimony at trial and at a pre-trial motion to suppress evidence.

[2] Since the trial court expressly eschewed reliance on any evidence obtained in the search of petitioner's apartment, the court of appeals found it unnecessary to pass on the validity of that search (Pet. App. 30), and the point is not in issue here.

29) and was therefore subject to arrest by the officers without a warrant. Both New York law and federal law provide for arrest without a warrant by police officers and narcotic agents in these circumstances. N.Y. Code Crim. Pro. § 177; 26 U.S.C. 7607. The State-court suppression order—based solely on the invalidity of the warrant—did not preclude the federal court from determining that the arrest, and therefore the incidental search, were legal. See *Rios* v. *United States*, 364 U.S. 253; *Elkins* v. *United States*, 364 U.S. 206, 223-224.[3]

Petitioner suggests that there was conflicting testimony by the officers as to when the arrest took place. But both of the officers first on the scene (Cahill and Meehan) testified, at the pre-trial hearing and at the trial, that petitioner was arrested and the bag seized from him at the threshold of his apartment (see Tr. I, 14a, 23a; compare Tr. I, 26a). The alleged inconsistency between Detective Cahill's testimony at the State trial and his testimony in the federal prosecution (Pet. 9) was specifically found by Judge Palmieri not to exist (Tr. I, 8a). The judge noted that since the issue at the State trial was the validity of the search warrant on which the officers relied in making the search, Cahill was not at that time interrogated with a view to uncovering the circumstances

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[3] *United States* v. *Pate*, 357 F.2d 911 (C.A. 7), relied upon by petitioner (Pet. 11-12) for the contrary proposition, is inapposite. The case arose on habeas corpus from a state court conviction challenging the admissibility of a confession introduced at the trial. The court held that due process had been accorded the petitioner and denied the petition.

of the arrest (see Tr. I, 15a). Although there were unimportant divergences in the testimony of Cahill and Meehan as to which one of them was the arresting officer (compare Tr. I, 13a-14a with Tr. I, 23a-25a), both officers agreed that petitioner was arrested, the bag seized from him and the warrant shown to him *outside* the apartment. The fact that federal agent Wysor's report, composed on the basis of what the two detectives allegedly told him, indicated that the formal arrest had taken place inside the apartment (Tr. I, 26a) is not dispositive of the issue. Whether or not the officers formally stated that petitioner was under arrest before entering the apartment, the evidence clearly showed that he was under official restraint and that the bag was taken from him outside the door. Thus, even on the version of the events most favorable to petitioner, the heroin in the bag was properly found to have been taken incident to his arrest. See 254 F. Supp. at 930.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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